



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 20, 1997

Mr. James T. Jeffrey, Jr.  
Remington & Jeffrey, A P.C.  
1306 W. Abram  
Arlington, Texas 76013-1711

OR97-0407

Dear Mr. Jeffrey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests was assigned ID# 103939.

The Waxahachie Police Department (the "department"), which you represent, received a request for thirty-nine categories of information concerning Regina and James Kozacki. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.<sup>1</sup> You have submitted samples of the requested information.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>3</sup>

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<sup>1</sup>As we are able to resolve this request under sections 552.103 and 552.108 of the Government Code, we need not now address your claimed section 552.101 exception.

<sup>2</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>The department filed a Motion for Protective Order concerning similar requests for production in the pending litigation, which motion the court granted. That order states that the department need not respond to the pending written discovery requests and that the plaintiffs and their counsel cannot make requests under chapter 552 of the Government Code to the City of Waxahachie or the department without first seeking and obtaining permission from the court to do so. However, although this office does not intend to interfere in any way with that order, the order does not make the information sought in the chapter 552 request confidential or otherwise seal it. *See* Gov't Code § 552.107(2). Nor does the order address the substance of the request made under chapter 552 of the Government Code received by the department prior to the date of the court's order. Therefore, we are obliged to address the request for information under the applicable terms of chapter 552.

The department indicates that it does not possess some of the requested information. A governmental body is not required to take affirmative steps to create or obtain information that is not in its possession. Open Records Decision No. 534 (1989). Therefore, the department need not respond to these requests.

In response to several of the requests, the department indicates that it does not understand what the requestor is seeking. Numerous opinions of this office have addressed situations in which a governmental body has received either an "overbroad" written request for information or a written request for information that the governmental body is unable to identify. Open Records Decision No. 561 (1990) at 8-9 states:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

In response to the request at issue here, the department must make a good-faith effort to relate the request to information in the department's possession and must help the requestor to clarify his request by advising him of the types of information available. We note that if a request for information is unclear, a governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b)); *see also* Open Records Decision No. 561 (1990) at 8.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

The department has provided us with a copy of a pending lawsuit between the department and the requestor's clients. Therefore, the department has established that litigation is pending. We have reviewed the submitted documents and conclude that they are related to the pending litigation. Therefore, the department may withhold the submitted information under section 552.103(a) of the Government Code.

We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Municipal ordinances also may not be withheld under section 552.103. Open Records Decision No. 551 (1990) at 2. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>4</sup>

We now address the department's claimed section 552.108 exception with regard to any information to which the opposing party has had access that is part of the "rubber band packet." Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). We note, however, that information normally found on the front page of an offense report is generally considered public.<sup>5</sup> *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). We therefore conclude that, except for front page offense report information and the information noted below, section 552.108 of the Government Code excepts the requested records to which the opposing parties have previously had access that are part of the "rubber band packet" from required public disclosure.

A search warrant affidavit is public by statute if the search warrant has been executed. Code Crim. Proc. art. 18.01(b). Therefore, if the search warrant was issued as a result of any search warrant affidavit, that affidavit may not be withheld under section 552.108. Similarly, any documents that have been filed with a court have become part of the public record and may not be withheld under section 552.108. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

You also contend that the requested information is confidential in accordance with the Texas Supreme Court's holding in *Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987). However, the *Hobson* case has no bearing on whether information is subject to public disclosure under chapter 552 of the Government Code. In *Hobson*, the court cited the predecessor statute to section 552.108 by analogy and recognized a law enforcement

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<sup>4</sup>We note that some of the submitted information is confidential by law or is protected by common-law privacy. See Gov't Code §§ 552.101, 552.117; Local Gov't Code § 143.089(g); cf. Local Gov't Code § 143.089(a). This information may not be released even after the conclusion of the litigation.

<sup>5</sup>The content of the information determines whether it must be released in compliance with *Houston Chronicle*, not its literal location on the first page of an offense report. Open Records Decision No. 127 (1976) contains a summary of the types of information deemed public by *Houston Chronicle*.

investigation privilege from civil discovery. This office, in Attorney General Opinion JM-1048 (1989), cited *Hobson* and its progeny but noted that neither *Hobson* nor any other reported Texas case directly addressed whether the act's exceptions created new privileges from discovery. Subsequent to the court's holding in *Hobson*, the Seventy-first Texas Legislature added subsection (f) to section 14 of former article 6252-17a (now found at Gov't Code § 552.005):

(f) This Act does not affect the scope of civil discovery under the Texas Rules of Civil Procedure. The exceptions from disclosure under this Act do not create new privileges from discovery.

Acts 1989, 71st Leg., ch. 1248, § 18, at 5029. This amendment reflects a legislative overruling of the court's dicta that the exceptions in chapter 552 create privileges from discovery.

In conclusion, the department may withhold all the submitted information except for any information seen by the opposing party, front page offense report information, and any search warrant affidavit which resulted in an executed search warrant. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



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Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 103939

Enclosures: Submitted documents

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